

Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC and Cement Masons Local No. 528 and Olympian Precast, Inc. Case 19-CD-481

January 30, 2001

DECISION AND DETERMINATION OF DISPUTE
BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

The charge in this Section 10(k) proceeding was filed on July 14, 2000, by Olympian Precast, Inc. (Olympian or the Employer) alleging that the Respondent, Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC (Glass Workers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Cement Masons Local No. 528 (Cement Masons).¹ The hearing was held on August 25, 2000, before Hearing Officer Peter G. Finch.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Washington corporation with its principal place of business located in Redmond, Washington, is engaged in the business of manufacturing architectural precast concrete building components. It annually ships goods valued in excess of \$50,000 from its Redmond facility to customers located outside the State of Washington. We accordingly find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find, based on the stipulation of the parties, that the Cement Masons and the Glass Workers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer manufactures custom precast concrete building components. These are the visible facing of buildings. The Employer works closely with the architect of a building in the design of these components, in order to achieve the desired effect for that building, including specific finishes, textures, and colors. Following manufacture,

¹ Although the charge technically named the Cement Masons as a second Respondent, the Employer does not allege (and the evidence at the hearing did not show) that Cement Masons used means proscribed by Sec. 8(b)(4)(D) to enforce its claim to the disputed work. Accordingly, consistent with the positions of the parties and the record, we shall treat the Glass Workers as the only Respondent in this case.

the Employer ships these customized components for installation at the building construction site. These components may suffer chips or cracks during shipping and installation.

The Employer supplied precast concrete building components under contract to Kiewit Construction Company (Kiewit) in the construction of the Washington State convention center. Some cracking of these components occurred during installation. The Employer's contract with Kiewit required the Employer to perform warranty work to repair cracks. Employees of the Employer represented by the Glass Workers worked at the convention center jobsite to perform this warranty work. The Employer and the Glass Workers are parties to a collective-bargaining agreement, effective from December 8, 1997 to December 1, 2001, which contains a clause covering the performance of warranty work.

The Cement Masons learned that the warranty work on the precast concrete building components at the convention center was being performed by Olympian's employees represented by the Glass Workers. The Cement Masons have a collective-bargaining agreement with Kiewit containing a subcontracting clause, which prohibits Kiewit from subcontracting any jobsite Cement Masons' work to a subcontractor who is not a party to a collective-bargaining agreement with the Cement Masons. Michael Wentz, assistant business agent for the Cement Masons, went to the convention center jobsite and informed Kiewit's superintendent, Jim Richards, that Olympian was not signatory to a contract with the Cement Masons, and that because of the subcontracting clause Kiewit needed to reassign the warranty work to employees represented by the Cement Masons or to assign it to a subcontractor with a contract with the Cement Masons. Richards declined to do either, but said he would get back to Wentz on this matter.

Thereafter, on June 22, 2000,² Kiewit's superintendent Richards held a meeting with Wentz and Kevin Jewell, vice president of operations for Olympian. The topic of the meeting was the Cement Masons' intention to file a grievance against Kiewit for violation of the subcontracting clause. Jewell testified that Wentz informed Jewell that Olympian could avoid "hassle" by either signing a project agreement with the Cement Masons covering the convention center warranty work or hiring employees represented by the Cement Masons to perform that work. According to Jewell, Wentz said that if Olympian "hire[d] people out of our hall to do your warranty work that would make this grievance go away." Jewell declined. On June 28, the Cement Masons filed a grievance against Kiewit, asserting violation of the subcon-

² All dates hereafter are in 2000, unless otherwise noted.

tracting clause by Kiewit's assignment of the warranty work to Olympian.

Thereafter, the Glass Workers on July 11 sent a letter to Olympian regarding the performance of the warranty work, which provided in part:

Allow this letter as appropriate notice to your company that under our labor agreement and our historical work precedent with your company, [Glass Workers'] members *have always performed job-site work* (warranty work). The work that is currently being performed by our members at the Kiewit job-site [sic]. [Emphasis in original.]

I have been informed that [Cement Masons] is demanding of Kiewit (contractor) that our members be removed from the job-site and members of [Cement Masons] perform all job-site warranty work.

[Y]ou know our members have always performed this type of work and if either Olympian or Kiewit cedes to the request of [the Cement Masons] the [Glass Workers] will immediately establish a picket line at the job-site to protect their interest and jurisdictional work.

B. The Work in Dispute

The work in dispute concerns the assignment of warranty and repair work on architectural precast concrete building components supplied by Olympian Precast, Inc. at the Washington convention center project in Seattle, Washington. The warranty and repair work can include sandblasting, concrete cutting, patching, etching, and related tasks.

C. Contentions of the Parties

1. Cement Masons

The Cement Masons contend that there is no jurisdictional dispute here because, under the Board's decision in *Capitol Drilling*,³ it did not make a claim to the work in question, and never threatened to picket or take unlawful coercive action in order to acquire that work. Rather, it contends that it has only pursued a contractual grievance against Kiewit, arising from Kiewit's failure to abide by the subcontracting clause in its contract with the Cement Masons. The Cement Masons emphasize that they did not initiate any contact with Olympian, made it clear that their only dispute was with Kiewit, and made no direct claim to Olympian for the work in dispute but merely "offer[ed] suggestions." The Cement Masons accordingly have moved that the Board quash the notice of hearing.

³ *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995).

2. The employer and the Glass Workers

The Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that the conduct of the Cement Masons constitutes a claim for the disputed work. The Employer points out that the Cement Masons made a claim for the work directly to Olympian, offering it the opportunity to either employ individuals represented by the Cement Masons or to sign a project labor agreement. The Glass Workers likewise argue that the Cement Masons not only pursued a grievance against Kiewit, but also made a direct claim to Olympian for the disputed work. The Employer and the Glass Workers accordingly assert that there are competing claims for the work at issue, and that *Capitol Drilling* is distinguishable. They contend that the work in dispute is thus properly before the Board for determination pursuant to Section 10(k) of the Act, and that the motion to quash should be denied.

The Employer asserts that the work in dispute should be awarded to employees represented by the Glass Workers. The Employer relies on its collective-bargaining agreement with the Glass Workers, its current assignment and its preference that employees represented by the Glass Workers continue to perform the disputed work, area and industry practice, the skills and training of employees represented by the Glass Workers, and the economy and efficiency of its operations. The Glass Workers likewise argue that, considering all these relevant factors, the work in dispute should be awarded to employees it represents.

D. Applicability of the Statute

It is well settled that the standard in a 10(k) proceeding is whether there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. It requires a finding that there is reasonable cause to believe that a party has used proscribed means to enforce its claim to the work in dispute, that there are competing claims to the disputed work between rival groups of employees, and that no method for the voluntary adjustment of the dispute has been agreed on.

The parties have stipulated that there is no agreed-upon method to adjust the dispute voluntarily. The record further establishes that the Glass Workers threatened the Employer with picketing if the disputed work was assigned to employees represented by the Cement Masons. The Cement Masons contend, however, that there are no competing claims to the work in dispute because it merely filed a grievance against Kiewit for breach of the subcontracting clause and that, under *Capitol Drilling*, no jurisdictional dispute should be found to exist here.

We disagree. In *Capitol Drilling*, the Board held that in the construction industry, a union's effort to enforce a lawful union signatory subcontracting clause against a general contractor through a grievance, arbitration, or court action does not constitute a claim to the subcontractor for the work. The Board distinguished, however, those cases in which a union does more than peacefully pursue a contractual grievance against a general contractor. The Board explained that a true jurisdictional dispute arises when a union seeking enforcement of a contractual claim not only pursues its contractual remedies against the employer with which it has an agreement, but also makes a claim for the work directly to the subcontractor that has assigned the work. In such circumstances, the Board stated that it would find that truly competing claims, and the use of threats of coercion to enforce a claim by the representative of either group of employees, would be sufficient to trigger an 8(b)(4)(D) allegation and consequent 10(k) proceeding. *Electrical Workers Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383 (1998); *Capitol Drilling*, supra, 318 NLRB at 811–812.⁴

The record in this case establishes that the Cement Masons did more than pursue its grievance against the general contractor Kiewit; Cement Masons also made a claim for the work directly to the party that had assigned the work: Olympian. As stated above, according to the testimony of Olympian's vice president Jewell, at the June 22 meeting, Cement Masons' assistant business manager Wentz said that if Olympian "hire[d] people out of our hall to do your warranty work that would make this grievance go away." We find that this testimony is sufficient to establish reasonable cause to believe that the Cement Masons made a claim for the disputed work directly to Olympian. See *J.P. Patti Co.*, 332 NLRB No. 69, slip op. at 3 (2000). There is no dispute that the Glass Workers by their letter of July 11 claimed the work in dispute, and that employees represented by the Glass Workers are currently performing the disputed work.⁵ We therefore find that there are competing claims to

Olympian for the work in dispute, and that a true jurisdictional dispute exists.⁶

In light of the threat to picket contained in the Glass Workers' July 11 letter, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, and that the dispute is properly before the Board for determination. We accordingly deny the Cement Masons' motion to quash the notice of hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962); *Asplundh Construction Corp.*, 318 NLRB 633 (1995).

The following factors are relevant in making the determination of this dispute.⁷

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute.

The Employer and the Glass Workers are parties to a collective-bargaining agreement effective from December 8, 1997, to December 1, 2001. Article VIII of that agreement provides that "[w]arranty work, as determined by the employer, at the customer's job site shall be performed under this Agreement." We thus find that the warranty work in dispute is covered by the Employer's collective-bargaining agreement with the Glass Workers. There was no evidence presented, in contrast, that the Employer has a collective-bargaining agreement with the Cement Masons covering the disputed work.⁸ The factor of collective-bargaining agreements accordingly favors

⁴ Chairman Truesdale notes that he dissented in *Capitol Drilling*. See 318 NLRB at 812–813. He agrees with his colleagues, however, that the circumstances of this case are distinguishable and that the holding from which he dissented in *Capitol Drilling* is not applicable here.

Member Hurtgen has previously stated his reservations regarding the Board's holding in *Capitol Drilling*. See, e.g., his concurring opinion in *Laborers Local 113 (Super Excavators)*, 327 NLRB 113 (1998). However, inasmuch as the instant case is distinguishable from *Capitol Drilling*, it is unnecessary for him to pass on the Board's holding in *Capitol Drilling*.

⁵ *Longshoremen ILWU Local 14 (Sierra Pacific Industries)*, 314 NLRB 834, 836 (1994) (performance of work by a group of employees is evidence of a claim for the work by those employees, even in the absence of an explicit claim).

⁶ *Capitol Drilling*, supra, 318 NLRB at 811–812.

As we explain below, we find that the disputed work should be awarded to employees represented by the Glass Workers. Our award does not preclude the Cement Masons from pursuing its grievance against Kiewit for violation of the signatory subcontracting clause, provided that it does not continue to claim the work from Olympian or engage in threats or other coercion. Id. at 810 fn. 4, citing *Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482, 1484 (1988).

⁷ The Cement Masons presented no evidence concerning the merits of this dispute.

⁸ Although the record reflects that the Cement Masons have a collective-bargaining agreement with the general contractor Kiewit, that agreement is not applicable because the company that ultimately controls and makes the job assignment—Olympian—is deemed to be the employer for purposes of a 10(k) proceeding. *Plasterers Local 502 (PBM Concrete)*, 328 NLRB 641 (1999); *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 940 (1989).

an award of the disputed work to employees represented by the Glass Workers.

2. Employer preference and current assignment

The Employer assigned the disputed work to employees represented by the Glass Workers and prefers that the work in dispute continue to be performed by employees represented by the Glass Workers. Accordingly, this factor favors awarding the work in dispute to the employees represented by the Glass Workers.

3. Area practice

The Employer presented evidence regarding only one other manufacturer of precast concrete building components in the area of Washington State. That company's employees are represented by the Laborers' Union, which is not involved in this dispute. We accordingly find that the factor of area practice does not favor awarding the work in dispute to employees represented by either Union.⁹

4. Employer's past practice

Kevin Jewell, Olympian's vice president since the Company's founding in 1988, testified that since that time all warranty work performed by Olympian has been assigned to employees represented by the Glass Workers. He further testified that Olympian has never assigned warranty work to employees represented by the Cement Masons. We accordingly find that this factor favors an award of the disputed warranty work to employees represented by the Glass Workers.

5. Economy and efficiency of operations

The Employer's vice president Jewell testified that its employees, when not performing warranty work, return to the Employer's plant and spend the remainder of their working time performing fabrication, finishing, and repair work in the plant. The Employer asserts that, in contrast, if the warranty work were assigned to employees represented by the Cement Masons, there would be a constant turnover of employees since warranty work is performed on only a periodic basis. The Employer thus argues that it is more economical and efficient to assign the warranty work to employees represented by the Glass Workers. The Cement Masons presented no evidence

concerning this factor. Accordingly, we find that this factor favors awarding the work in dispute to employees represented by the Glass Workers.

6. Relative skills and training

The Employer's vice president Jewell testified that employees represented by the Glass Workers undergo an extensive on-the-job training process in the finishing and repair of precast building components that takes up to 2 years to complete. This process includes learning increasingly difficult finishing techniques, including sack rub, sandblasting, acid wash, and diamond polishing work, as well as experience in performing patching repair. No evidence was presented concerning the skills and training of employees represented by the Cement Masons. We accordingly find that this factor favors awarding the disputed work to employees represented by the Glass Workers.

Conclusions

After considering all the relevant factors, we conclude that Olympian's employees represented by the Glass Workers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and current assignment, past practice, economy and efficiency of operations, and skills and training. In making this determination, we are awarding the disputed work to employees represented by Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, not to that Union or to its members. This determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Olympian Precast, Inc. represented by Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC are entitled to perform the warranty and repair work on architectural precast concrete building components supplied by Olympian Precast, Inc. at the Washington convention center project in Seattle, Washington, which can include sandblasting, concrete cutting, patching, etching, and related tasks.

⁹ No evidence was adduced as to the general industry practice and the evidence was limited to the area practice in Washington State.